

# EXHIBIT B

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
MIDDLESEX COUNTY  
DOCKET NO. L-6483-13  
A.D.# \_\_\_\_\_

WAKEFERN FOOD CORP., ET AL., )  
)  
Plaintiff, )  
)  
vs. )  
)  
LEXINGTON INSURANCE )  
COMPANY, ET AL., )  
)  
Defendant. )

TRANSCRIPT  
OF  
MOTIONS FOR  
SUMMARY JUDGMENT

Place: Middlesex County Courthouse  
56 Paterson Street  
New Brunswick, New Jersey 08903

Date: June 28, 2018

BEFORE:

HONORABLE MELVIN L. GELADE, J.S.C.

TRANSCRIPT ORDERED BY:

SHERILYN PASTOR, ESQ. (McCarter & English)

Transcriber, Sherry M. Bachmann  
G&L TRANSCRIPTION OF NJ  
40 Evans Place  
Pompton Plains, New Jersey 07444

Sound Recorded  
Recording Operator,

1 APPEARANCES:

2 SHERILYN PASTOR, ESQ.  
3 (McCarter & English)  
4 Attorney for the Plaintiff

5 WILLIAM D. WILSON, ESQ.  
6 WAYNE R. GLAUBINGER, ESQ.  
7 (Mound Cotton Wollan & Greengrass)  
8 Attorneys for the Defendant, Lexington

9 VAL E. WAMSER, ESQ.  
10 (Nicoletti Hornig & Sweeney)  
11 Attorney for the Defendant, BWD Group

12 JOSEPH D. DEAL, ESQ.  
13 PATRICIA M. HENRICH, ESQ.  
14 (Reilly, McDevitt & Henrich)  
15 Attorneys for the Defendant, Associated Agencies  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

PROCEEDING

PAGE

Motions for Summary Judgment

4  
28  
37

Judge's Decision

24  
35  
71

1 THE COURT: Please be seated, everyone. Good  
2 morning.

3 MS. PASTOR: Good morning.

4 MS. HENRICH: Good morning, Your Honor.

5 THE COURT: I'm Judge Gelade, and this is the  
6 matter of WAKEFERN -- I'm sorry -- WAKEFERN FOOD CORP.  
7 V. LEXINGTON INSURANCE, ASSOCIATION AGENCIES, AND BWD  
8 GROUP, docket number L-6483-13. So, first, I'll take  
9 appearances of Counsel for Wakefern.

10 MS. PASTOR: Good morning, Your Honor. I'm  
11 Sheri Pastor from McCarter & English and I represent  
12 Wakefern Food Corporation and its members.

13 THE COURT: Thank you. And for Lexington  
14 Insurance?

15 MR. WILSON: Good morning, Your Honor.  
16 William Wilson and Wayne Glaubinger from Mound Cotton  
17 on behalf of defendant, Lexington.

18 THE COURT: Okay. For Associated Agencies?

19 MR. DEAL: Good morning, Your Honor. Joseph  
20 Deal and Patricia Henrich from Reilly, McDevitt &  
21 Henrich, on behalf of the Associated Agencies, Inc.

22 THE COURT: Okay. And, finally, BWD?

23 MR. WAMSER: Good morning, Your Honor. Val  
24 Wamser from Nicoletti Hornig & Sweeney, representing  
25 the defendant, BWD Group.

1 THE COURT: Okay. Okay. There are several  
2 motions and cross-motions on today. So we'll start  
3 with Lexington's motion for summary judgment seeking to  
4 dismiss plaintiff's breach of contract, declaratory  
5 judgment, and breach of duty of good faith and fair  
6 dealing claims and plaintiff's cross-motion for summary  
7 judgment or for a declaratory judgment that Lexington's  
8 policies, business loss due consideration provision  
9 does not permit a 500,000 credit for actual profits  
10 made up posting direction. That's -- those are the  
11 two. So that will be Ms. Pastor and Mr. Wilson?

12 MR. WILSON: Yes, Your Honor.

13 THE COURT: Okay. As I understand it, --  
14 now, I want the record to reflect that I was assigned  
15 this case because of a conflict of the Judge who  
16 actually heard oral argument on the motions, Judge  
17 Brady. After I was assigned the case, I had extensive  
18 conversation with Judge Brady. She prepared memos.  
19 I'm familiar with all of the arguments made by all  
20 parties in the matter.

21 I have -- I have read all the relevant case  
22 law, all the relevant documents. I've gone through the  
23 entire file, not word for word. That's for the jury,  
24 not for me, but I've certainly familiarized myself with  
25 what's going on.

1           Lexington has -- is the insurer and Wakefern  
2 is the insured. Wakefern -- we normally think of the  
3 ShopRites as a chain. It's not really. It's more of a  
4 hybrid. There are some ShopRites that are owned --  
5 there are numbers of ShopRites, which are owned by  
6 single entities, such as the one that's in my  
7 neighborhood is Saker. Saker ShopRite owns a lot of  
8 them. There are a lot of individual stores.

9           So Wakefern is the -- I'll call it the  
10 umbrella entity for all of the ShopRites, which were  
11 involved in this proceeding and, among other things,  
12 the Lexington covered casualty insurance, property  
13 damages, and the like, in this case, due to a named  
14 store, Hurricane or Tropical Storm Sandy. We never --  
15 I never really understood the difference between a  
16 hurricane or not a hurricane but, in any event, it's a  
17 named storm.

18           There doesn't seem to be any dispute about  
19 that, and there isn't much dispute that there were a  
20 number of stores that were extensively damaged and that  
21 they suffered losses and spoliation of food and the  
22 like and sought recovery, and there were several  
23 issues.

24           The other motion has to do with a different  
25 issue. But, in this particular motion, the Lexington

1 is claiming that there really is -- is no need to  
2 determine whether or not the policy covered everything.  
3 What they're saying is that there was -- after the loss  
4 had occurred, the company -- those particular stores  
5 that were damaged actually made up part of the losses  
6 that Lexington said they covered and, therefore, they  
7 should get a credit in this case of \$500,000.

8           There were several motions in the matter  
9 before these motions were filed and they had to do  
10 primarily with, number one, what was the value, the  
11 amount of the deductible under the policies, which was  
12 a two percent -- and I'm going to -- you know, I keep  
13 -- I keep saying -- the true -- let's see -- total  
14 insurance value, the TIV. That's really on the other  
15 motion, but that was an issue. Judge Francis found  
16 that the deductible was the two percent of the total  
17 insured value and there were appraisers appointed by  
18 both sides and, eventually, an amount of money came  
19 into play on that.

20           Lexington had allegedly withheld payment of  
21 much of the loss while all of that was going on and,  
22 eventually, the deductible was fixed and I think it was  
23 somewhere around \$23 million and that deductible was --  
24 well, after that deductible was taken into account,  
25 Lexington paid what it considered to be the amount of

1 the claim, less, in this case, \$500,000 for made up  
2 post-interruption profits.

3 And the -- so the question that I understand  
4 is before me in this case is on that issue, whether or  
5 not post-interruption earnings, profits, whatever, can  
6 be taken into consideration under the policy. Also,  
7 plaintiffs claim that there were -- that after the  
8 claimed losses were fixed at an amount above the \$23  
9 million, the -- there was also spoilage claims  
10 outstanding and they ultimately were paid, I think, in  
11 the amount of \$4.7 million. The claim was \$5.6  
12 million. So there are various issues.

13 So the first issue is, does a material fact  
14 exist precluding the dismissal of plaintiff's breach of  
15 contract claim because Lexington withheld the credit or  
16 whatever? And the applicable language in Lexington's  
17 policy is the company shall be liable subject to all  
18 other conditions of this policy, not inconsistent  
19 herewith, for the actual loss sustained of the  
20 following during the period of interruption. One,  
21 gross earnings, less all charges and expenses that do  
22 not necessarily continue during the interruption of  
23 production or suspension of business operations or  
24 services and the parties are at odds over what --  
25 whether or not they can -- the defendant can prevent

1 what it calls an unjust enrichment based on the  
2 following.

3 In determining the amount of loss payable  
4 under this coverage, due consideration shall be given  
5 to the experience of the business before the period of  
6 interruption and the probable experience thereafter had  
7 no loss occurred and to the continuation of only those  
8 normal charges and expenses that would have existed had  
9 no interruption of production or suspension of business  
10 operations or services occurred.

11 And Lexington cites primarily -- and I've got  
12 a lot of paperwork here, so I'm not going to be as fast  
13 as normally would be expected. But on -- I thought I  
14 had these two motions. There's five, but let's see.  
15 Okay. Here we are. So Lexington cites to ELBERON  
16 BATHING COMPANY V. THE AMBASSADOR INSURANCE, 77 New  
17 Jersey 1, which it alleges stands for the proposition  
18 that the plaintiff cannot receive a double recovery for  
19 profits that it made up after its business operation.

20 Defendants cite -- take issue with the  
21 plaintiff's interpretation -- I'm sorry -- with the  
22 defendant's interpretation of the holding of the Court  
23 in that case and distinguish it because it was a fire  
24 loss and was governed by statute, not a casualty loss  
25 of this type. But more important, plaintiffs cite to

1 two Fifth Circuit cases, which were diversity cases,  
2 FINGER FURNITURE COMPANY, INC. V. COMMONWEALTH  
3 INSURANCE and 404 F.3d 312, which was a 2005 matter and  
4 it arose out of the -- an appeal from the United States  
5 District Court for the District of Texas.

6 Second was CATLIN SYNDICATE V. IMPERIAL  
7 PALACE OF MISSISSIPPI, 600 F.3d 511, a 2010 decision in  
8 the Fifth Circuit out of the Mississippi District -- so  
9 -- District of Mississippi Court. And, there,  
10 plaintiff contends that under the -- the policy is very  
11 similar to this. The Court -- the Fifth Circuit's  
12 reasoning would also apply to the reasoning of our  
13 Courts in published decisions to confine the decision  
14 -- the decision on interpretation of the policy to the  
15 actual language of the policy.

16 So I'll hear -- since this is on this issue  
17 -- this is plaintiff's cross-motion, I'll hear from  
18 plaintiff.

19 MS. PASTOR: Thank you, Your Honor, and thank  
20 you for taking the time that you took to become  
21 familiar with the filing. I know the magnitude of the  
22 paper and know that the oral argument you listened to  
23 would have been over two hours, so I appreciate that.

24 THE COURT: It's -- well, again, I want to  
25 make clear, as I said, I asked my law clerk to inform

1 the parties of this hearing and tell everyone that I  
2 don't have any time constraints and I don't -- it isn't  
3 necessary to reargue the entire oral argument that was  
4 done before. However, that doesn't mean that I'm going  
5 to abridge anybody's arguments. I assume you're all  
6 fine attorneys. Your briefs show that you are skilled  
7 in the standard of excellence, so you're not going to  
8 reargue everything, but I'm certainly not going to  
9 limit you. You can tell me whatever you think is  
10 necessary for me to hear to represent your clients.

11 MS. PASTOR: Thank you, Your Honor.

12 THE COURT: Ms. Pastor?

13 MS. PASTOR: On Wakefern's motion, Wakefern's  
14 motion is very narrow. It's limited to makeup and what  
15 the Lexington insurance policy allows and provides and  
16 that is, in part, because going beyond that, we believe  
17 there would otherwise be fact questions, so I'm going  
18 to come back to that.

19 The Lexington policy provides coverage for  
20 business interruption. It looks at the period of  
21 interruption and the policy calls for calculating  
22 Wakefern's gross earnings and its loss sustained during  
23 that period. In doing that, the policy is very  
24 specific about how Lexington calculates those gross  
25 earnings and it expressly says that it's going to pay

1 the total net sales, less the cost of merchandise. It  
2 doesn't say less the cost of anything else.

3 It also goes onto say that, in addition to  
4 paying those total net sales, it's going to pay all  
5 other lost earnings. Again, this is talking about what  
6 Wakefern has in coverage and what Wakefern is paid and  
7 there's nothing in that provision that reduces that  
8 amount.

9 Now, what -- in looking at those items, in  
10 calculating, the policy says, you look to two things.  
11 One is the actual experience before, which you would  
12 have had because the stores would have been open and  
13 they would have actual experience and what you look  
14 then is at the probable thereafter.

15 Lexington focuses on the word thereafter as  
16 if it gives it carte blanche to look at anything it  
17 wants. The word probable is important and must be  
18 given meaning. And why do I say probable? Because  
19 probable is predicting when the stores are closed, what  
20 they would have done in business. If it were actual  
21 thereafter, that would be looking at what Wakefern did  
22 when it reopened the stores and was able to make sales.

23 There is nothing in the policy that says,  
24 Lexington can look at arbitrarily some stores, not all  
25 stores, and then seven days for those stores. There is

1 nothing that says seven days, ten days. It doesn't  
2 allow that process at all.

3 And this issue was before the Court and Judge  
4 Francis specifically in 2016 because Lexington made a  
5 motion to dismiss the makeup claim and, in the Court's  
6 July 15, 2016, decision at Page 15, the Court offers  
7 its analysis of makeup and specifically says, only  
8 historical sales figures shall be considered when  
9 determining loss and sales figures after reopening  
10 should not be taken into account and the Court quotes  
11 from and cites to CATLIN SYNDICATES, the Fifth Circuit  
12 case Your Honor just mentioned.

13 So this Court has already determined, albeit  
14 when considering a motion to dismiss makeup on bad  
15 faith, which is stayed, but no different than the  
16 contract issue that is before the Court that what it  
17 ought to be considering is historical sales figures and  
18 not doing what Lexington is doing, which is saying,  
19 when the lights turned on and you, Wakefern, were not  
20 entitled to anymore money, we're going to see what you  
21 made anyway and reduce that from what you lost while  
22 the lights were out.

23 And, in fact, to go beyond that as Lexington  
24 asks, what the Court found was there remains a factual  
25 dispute, whether makeup was included in the policy and

1 if Lexington wrongfully took a makeup credit. Why is  
2 that important? Because the flip side, asking for  
3 \$500,000 in makeup doesn't work, didn't work then,  
4 doesn't work now. Why doesn't it work? Because even  
5 though after the named storm decision was rendered by  
6 the Court, Lexington declined to pay. It asked instead  
7 for appraisal and the parties were sent out for  
8 appraisal.

9           The mediator -- or the appraisers were asked  
10 to value makeup, not to decide as a matter of law  
11 whether either party was entitled to it or not entitled  
12 to it and what they found was -- and their award is  
13 important -- they used the word gross amount. The  
14 gross amount of makeup is \$500,000 and why? That's  
15 because Lexington tried to offer two arguments to the  
16 appraisers.

17           One was an argument about the policy, which  
18 it declined to rule on and directed in its award that  
19 that was deferred to the Court for resolution but then  
20 it also brought up arguments about, well, you can't  
21 have a windfall, you can't make money twice. Well, if  
22 we get to that second part and that's not what  
23 Wakefern's motion is about, then there are questions of  
24 fact because Lexington did not pay all amounts. This  
25 makeup comes from things that it declined to pay, so

1 let me give the Court an example.

2 The lights go back on, the power comes on,  
3 and now a cashier can start ringing up products if the  
4 store opens. It was Lexington's view that if we had to  
5 pay the salaries for people during the time the store  
6 was out and have people who were what they called idle  
7 there, so that they could start ringing up products, so  
8 that they could start cutting meat for the deli  
9 counter, that that wasn't covered and they weren't  
10 paying for it.

11 So there were hundreds of thousands of  
12 dollars not paid to Wakefern under this policy because,  
13 according to Lexington, that's not what's included in  
14 its policy. Yet, it takes advantage of it by trying to  
15 say that the policy allows it to look after and see  
16 whether we were making any money after business  
17 interruption ended.

18 It is Wakefern's position as the policy  
19 provides that it does not permit makeup. It doesn't  
20 have the words makeup in it. The only place they were  
21 able to find those words were in a provision relating  
22 to makeup production, which is what this isn't,  
23 Wakefern is a manufacturer, but more importantly, its  
24 witnesses were deposed and they didn't say, yes, you'll  
25 find that in 3C, just turn to Page 2. What they said

1 is, oh, it's a little bit more complex. You would have  
2 to put together provisions, we can't point you to  
3 something specific. This was their corporate rep.

4           Instead, you would have to look at the  
5 theories of double recovery and theories of indemnity.  
6 All of those things, though, are outside the policy and  
7 what they have not been able to point to the Court  
8 because it's not in there is a provision that says,  
9 after the business interruption ends, Lexington can  
10 look at those stores it regards as having made up  
11 losses for a seven-day period and take the credit for  
12 it.

13           On that basis, Your Honor, it is our view  
14 that summary judgment is appropriate on this  
15 interpretation of the policy and after we -- I will  
16 reserve all other arguments on the Lexington issues  
17 until we get to their motion.

18           THE COURT: Thank you.

19           MS. PASTOR: Thank you.

20           THE COURT: Okay. Mr. Wilson?

21           MR. WILSON: Thank you, Your Honor, and  
22 welcome to this case. It's been around for a long  
23 time. Ms. Pastor raised a number of different  
24 arguments during her oral argument, things such as  
25 payroll coverage, other things. Those are not before

1 the Court. Those are not issues. They didn't purchase  
2 different types of coverage that they wished they did  
3 and, now, they're trying to reargue that. But that's  
4 not what's before the Court.

5 What's before the Court is, can Lexington  
6 take a credit for makeup? Now, Your Honor, there is no  
7 question that Wakefern made up sales after the loss.  
8 The appraisers found that and what the appraiser said  
9 is Lexington claimed it was much more than 500,000.  
10 Wakefern claimed it was zero. The appraisers who have  
11 accounting and legal background sat down. What did  
12 they look at, Your Honor? They looked at the  
13 historical sales and they said, well, after the period  
14 of interruption, Wakefern made \$500,000 more than it  
15 would have had it not been for the loss. So, clearly,  
16 there was \$500,000 in makeup and that's what the  
17 appraisal award says.

18 Now, Ms. Pastor says that it -- well, you  
19 have to -- it says, gross. It means, it could be up to  
20 500,000. That's not what they said. What the  
21 appraiser said is if you don't take into account  
22 makeup, you get paid 4.7 million. If you take into  
23 account makeup, you get 4.2. It's a gross number. You  
24 either subtract it or you don't.

25 There is no 400,000 worth makeup, 300,000,

1 200,000. It's 500,000 and the appraisers that the  
2 parties selected agreed to that. Now, this is not a  
3 forced award by a mediator. The parties got together,  
4 the --

5 THE COURT: Excuse me. This is a contract  
6 interpretation and what the appraisers do is not  
7 binding on the Court. This is an interpretation of the  
8 contract. This is -- assuming they did that, what --  
9 what is the basis for their being permitted to do that?

10 MR. WILSON: Exactly, Your Honor. So the  
11 reason that I started with that is to say --

12 THE COURT: I'm sorry.

13 MR. WILSON: -- to get rid of any confusion  
14 that there was or wasn't makeup. You knew there was  
15 makeup. The question is, do you get a credit and  
16 that's where you go to the policy. And what we would  
17 say, Your Honor, is the policy says you look at the  
18 actual loss sustained. What is the actual loss  
19 sustained?

20 So you look at the provision, which you read  
21 and it says, due consideration shall be given to  
22 certain things and it says, in determining the amount  
23 of loss payable under this coverage, due consideration.  
24 Now, what is due consideration? It's not an exact  
25 phrase. Typically, what you do is you have

1 accountants, you have experts. They go in there and  
2 they look at the documents.

3 And what do they consider? It says, due  
4 consideration shall be given to the experience of the  
5 business before the period of interruption. Well,  
6 that's based on actual amounts because you knew what  
7 you sold prior to the period of interruption. But then  
8 it says, and the probable experience. Now, what is the  
9 probable experience? That's based on historical sales  
10 and Ms. Pastor has admitted, you look at historical  
11 sales. She says, oh, but then you ignore actual. But  
12 it says right here, you have to look at the probable  
13 experience thereafter and thereafter is after the  
14 period of interruption.

15 So what do I do, Your Honor, and this is an  
16 example I used last time and I don't want to repeat  
17 myself but just because, if I look prior to the period  
18 of interruption, I would have sold -- I sold \$10.  
19 That's actual. I sold \$10 before the storm. During  
20 the period of interruption, I sold zero. Well, how do  
21 I determine a loss? Well, I have to figure it based on  
22 historical sales. What would I have sold during that  
23 period? And because these are supermarkets, they track  
24 their sales down to the penny. They know exactly what  
25 they're going to sell.

1                   So say they determine, well, during the  
2 period of interruption, I would have sold \$10. So Ms.  
3 Pastor says, stop right there. You have a \$10 loss.

4 But I look at the policy and it says, and the probable  
5 experience thereafter had no loss occurred. So I don't  
6 stop at the period of interruption. I have to look  
7 beyond the period. I have to look thereafter.

8                   So I look at the sales and I say, well, how  
9 do I determine the probable experience thereafter?  
10 Well, I look at historical sales and during that  
11 period, I would have earned \$10. So I looked before  
12 the storm, I had \$10, during the storm, I would have  
13 earned \$10 but I got zero, and after the storm, the  
14 period thereafter, I should have earned \$10. But as it  
15 turns out, I earned \$15.

16                   So, now, if I look at the period before, the  
17 period during, and the period after, as the policy  
18 says, I have a total sales of \$25. I would have earned  
19 \$30 based on historical experience and, now, I have a  
20 \$5 loss. I don't have a \$10 loss because I considered  
21 the period thereafter.

22                   And in an insurance policy, every single word  
23 has to have meaning. If you read Wakefern's briefs,  
24 they changed the word thereafter to during and why is  
25 that important? Because when you look at the Fifth

1 Circuit cases, they didn't use the word thereafter.  
2 The language changed and what happened is insurance  
3 companies often modify language follow court decisions.

4 So you can't look at FINGER FURNITURE or CATLIN  
5 SYNDICATES because they didn't have the word  
6 thereafter. So what we have to look at is the policy  
7 that we have before us, not the policy another Court  
8 had before them or not the policy Wakefern wanted.

9           So our position here is that you have to give  
10 thereafter meaning and how else can you give it meaning  
11 other than to look at what the sales were because, if  
12 you look at the probable experience thereafter, what  
13 would you have earned thereafter? Ms. Pastor said,  
14 well, you look at what you would have earned and then  
15 you ignore it. But that's not giving it due  
16 consideration. In order to give it due consideration,  
17 you have to say, well, what would I have earned, what  
18 did I earn, I have to look at the period before, I have  
19 to look at the period during.

20           So we think it's very simple. And when we  
21 look at this language under New Jersey law, we have to  
22 give every word meaning. We can't treat anything like  
23 mere surplusage. And we don't look at extrinsic  
24 evidence if the policy is clear. Now, the word  
25 thereafter, I think, is very clear, so we don't look at

1 extrinsic evidence.

2 And Ms. Pastor brought up what certain  
3 witnesses said or didn't say. One thing that she  
4 didn't point out was their adjustor had said, sure, we  
5 always look at makeup. That's a common thing in the  
6 insurance industry and that's why I started out by  
7 mentioning, the two appraisers both recognize the  
8 concept of makeup. They didn't say, we're entitled to  
9 take it under the policy but they recognize it as a  
10 valid concept and a number that can be calculated and  
11 they did calculate the number.

12 So our position is simple, Your Honor. You  
13 have to give meaning to every phrase and word in the  
14 policy and, clearly, you've got to look at the probable  
15 experience thereafter, which is the period -- after the  
16 period of interruption and you look at both historical  
17 sales to get the probable experience and then the due  
18 consideration, you bring into your actual sales.

19 Very, very important, Your Honor, the policy  
20 says thereafter, not during like it did in FINGER  
21 FURNITURE and CATLIN SYNDICATES. Thank you.

22 MS. PASTOR: Your Honor, I would just like to  
23 in rebuttal make two points, please. Point one, the  
24 language in CATLIN mirrors. You'll find it in the  
25 Court's opinion of July 15, 2016, specifically, at Page

1 16. Judge, --

2 THE COURT: I -- I have both FINGER and  
3 CATLIN sitting right in front of me.

4 MS. PASTOR: As Judge Francis noted, the  
5 provision there says, before loss and the probable  
6 experience thereafter had no loss occurred. The second  
7 point, Your Honor, was there was mention of our  
8 adjustor. As you'll see in our brief, the adjustor  
9 said that, yes, he was familiar with the concept of  
10 makeup and had applied it in cases where a policy  
11 expressly called for it. This policy does not. Thank  
12 you, Your Honor.

13 THE COURT: Thank you very much.

14 MR. WILSON: Your Honor, can I just make one  
15 point?

16 THE COURT: Certainly.

17 MR. WILSON: The -- in distinguishing the  
18 FINGER FURNITURE, as Ms. Pastor just read the language,  
19 it talks about you have to look at the business before  
20 the loss and the probable experience thereafter.  
21 Probable experience thereafter in that case modifies  
22 the laws before the loss. In our policy it says, you  
23 have to look at the business before the period of  
24 interruption and the probable experience thereafter.  
25 Thereafter in our policy refers to the period of

1 interruption, not the loss. The FINGER FURNITURE  
2 policy was talking, you look at the experience during  
3 the period of interruption and that's where the  
4 distinction is.

5 THE COURT: Okay. The -- this is simply an  
6 issue of interpretation of what the parties bargained  
7 for and the quoted policy provision before this Court  
8 reads, due consideration shall be given to the  
9 experience of the business before the period of  
10 interruption and the probable experience thereafter had  
11 no loss occurred.

12 That's precisely in the CATLIN, which is  
13 CATLIN SYNDICATE V. IMPERIAL PALACE, where the insurer  
14 in that case had a dispute with the insured and, in  
15 that case, the insurer was arguing that historical  
16 sales figures should be considered when determining the  
17 loss. Imperial Palace said, sales figures after  
18 reopening should also be taken into account.

19 In the FINGER FURNITURE case, it was the  
20 reverse. It was very similar to what happened in this  
21 case. It was the -- because, in that case, the insured  
22 wanted to limit -- limit the experience, what happened  
23 before and not take into account sales after and, in  
24 the FINGER FURNITURE case, it was the reverse was same  
25 as here where the insurer took the position that we do

1 look to what happened thereafter.

2 So in each of those cases, the policy  
3 language was almost verbatim what it is in this case.

4 In this case, it says, in determining the amount of  
5 loss payable under this coverage and the -- in CATLIN,  
6 it was in determining the amount of the time element  
7 losses insured against this policy.

8 In FINGER FURNITURE, it was determining the  
9 amount of gross earnings covered hereunder for the  
10 purposes of ascertaining the amount of loss sustained,  
11 almost identical to what is in this case because it  
12 says, in determining the amount of loss payable under  
13 this coverage. It all amounts to the same thing.

14 In fact, in the CATLIN case, the district --  
15 there was an argument that, in FINGER FURNITURE, there  
16 was some difference in terminology under the agreement  
17 but the principle was exactly the same because in  
18 CATLIN, in determining the amount of time element as  
19 insured against this policy -- by this policy, due  
20 consideration shall be given to experience of the  
21 business before the loss and the probable experience  
22 thereafter had no loss occurred.

23 In FINGER FURNITURE, in determining the  
24 amount of gross earnings covered hereunder for purposes  
25 of ascertaining the amount of loss sustained, due

1 consideration shall be given to the experience of the  
2 business before the date of the damage or destruction  
3 and to the probable experience thereafter had no loss  
4 occurred. So it's essentially the same.

5 And in CATLIN, the Court found that the  
6 language of the business interruption provision mirrors  
7 that of FINGER FURNITURE. There was some distinction  
8 because of the one said loss and the other said  
9 business and they said that the usage damage and  
10 destruction and loss and -- are functionally equivalent  
11 in the two different policies. In fact, they cite loss  
12 is a synonym for damage in the unabridged dictionary.

13 So we, too, do the same thing and both of  
14 those cases stand for the proposition, as plaintiff  
15 argues, that there is no ambiguity in the agreement and  
16 that the business interruption provisions are to be  
17 determined only with respect to what happened before --  
18 because this says and I'll quote from FINGER FURNITURE.  
19 "The policy language indicates that a business  
20 interruption loss will be based on historical sales  
21 figures. Specifically, the policy states that "due  
22 consideration shall be given to the experience of the  
23 business before the date of damage or destruction and  
24 to the probable experience thereafter no loss  
25 occurred."

1 Historical sales figures reflect a business'  
2 experience before the date of the damage or destruction  
3 and predict the company's probable experience had the  
4 loss not occurred. The strongest and most reliable  
5 evidence of what a business would have done had the  
6 catastrophe not occurred is what it had been doing in  
7 the period just before the interruption and it -- and  
8 it says that the contract -- the insurer cannot look  
9 prospectively to what occurred after the loss to  
10 determine whether there was a business interruption  
11 loss and, therefore, found in favor in that case in  
12 FINGER FURNITURE -- in favor of the insured -- of the  
13 insured and in CATLIN in favor of the insured.

14 Similarly, in this case, there was no makeup  
15 provided anywhere in the insurance contract. There --  
16 the interpretation of the contract provision in this  
17 case is as -- again, as the Court in CATLIN state -- in  
18 CATLIN stated, it has to be determined on dictionary  
19 definitions and plain meanings of what a loss is. So I  
20 find that there is no basis for the -- an  
21 interpretation of this insurance agreement to be --  
22 take into account actual losses sustained or made up  
23 after the hurricane, after the named storm occurred  
24 and, therefore, the motion -- the cross-motion for  
25 summary judgment is granted.

1           Let me see if I have the order in front of  
2 me. Okay. I'm going to try to put these -- okay.  
3 We'll now hear from Mr. Wilson on the subsequent  
4 motions, on defendant's motions.

5           MR. WILSON: Thank you, Your Honor. The  
6 question now that you've ruled on this issue is what,  
7 if anything, is left to try? Is there anything in this  
8 case and our position is, there is nothing left.  
9 Makeup was the only outstanding issue. There is a  
10 separate bad faith claim, and we're not addressing that  
11 because that's been severed.

12           So the question is, if this case were to  
13 proceed to trial on July 23rd or whatever the date is,  
14 what could we possibly try and, as you know, and we've  
15 discussed before about when there was a dispute as to  
16 the amount of a loss, we demanded appraisal. They  
17 opposed our demand for appraisal. We did a motion to  
18 compel and Judge Francis ruled in our favor and said,  
19 you're entitled to appraisal.

20           One of the arguments Wakefern made was, well,  
21 you don't get appraisals because you breached the  
22 contract and the Judge said, well, there's no evidence  
23 of a breach of contract. I'm going to order you to  
24 appraisal and the appraisers will value the loss.

25           So the appraisers went out and they valued

1 everything. They had several days. They looked at  
2 everything. They valued the selling price valuation.  
3 They looked at this as interruption. They looked at  
4 makeup. They looked at every issue. So there's really  
5 nothing left.

6 Now, Ms. Pastor will presumably tell you,  
7 well, they delayed the payment of the loss, so we have  
8 some delay damages. She cannot quantify those delay  
9 damages, though. In any event, those delay damages  
10 would be a bad faith claim because, under the policy,  
11 there's no coverage for delay.

12 Number two, she'll say, well, we should get  
13 some interest. And, once again, the policy does not  
14 provide interest and under the case law, she doesn't  
15 get interest because they moved for interest following  
16 the appraisal award and Judge Francis rejected that.

17 Now, there may be an interest argument under  
18 the bad faith claim, but we're not talking about that.  
19 So then the last thing is, well, what else do you have  
20 and last time Ms. Pastor said, well, we have attorneys'  
21 fees. Well, attorneys' fees are not recoverable under  
22 the policy. They would only be recoverable in  
23 connection with a bad faith claim.

24 So you have to ask yourself, Your Honor, --  
25 and I know you have lots of experience as a trial Judge

1 -- what can we possibly try against Lexington? All the  
2 damages were valued by the appraisers. There's nothing  
3 left to value and Ms. Pastor cannot identify anything  
4 that the appraisers didn't value or any damages they've  
5 sustained that would be covered under the policy. The  
6 only issue that was left open by the appraisers was the  
7 makeup and you've already decided that.

8           So if we were to empanel the jury, we would  
9 go hear the testimony, you would have all the witnesses  
10 come in. At the end of the day, you would have to say,  
11 well, what can they recover? There is nothing left  
12 under the policy, so summary judgment should be granted  
13 as to the remaining claims under the breach of  
14 contract.

15           And that, presumably, Your Honor, is there's  
16 a motion to sever out there because, you know, they do  
17 have claims against the broker but what's left against  
18 the insurance company? There's nothing now. The only  
19 thing that was left before was the makeup. Now,  
20 there's just nothing left to try. There's nothing to  
21 submit to a jury, and there's nothing that they can  
22 point to that would be recoverable under the policy,  
23 and that's putting aside the bad faith. Thank you.

24           THE COURT: Well, I'm sorry. Isn't there  
25 also a claim, if I read the record correctly, about

1 Lexington's use of Location 700 and calculating the  
2 total insured value?

3 MR. WILSON: That would be a bad faith claim  
4 because, what happens is, when you calculate the  
5 deductible, you have to look at all the locations, so  
6 the appraisers calculated the deductible. So what  
7 happens is, if I do Location 700, what should it be,  
8 how should we value it, how should we do it, once  
9 again, what do you get at the end of the day if I come  
10 up with a number? Well, we don't know what the  
11 appraisers use because it was -- they didn't put it  
12 down, but there's no more damages that could come out  
13 of the appraiser's value of the holdoffs.

14 THE COURT: Okay.

15 MR. WILSON: Thank you.

16 THE COURT: Thank you.

17 MS. PASTOR: Your Honor, in terms of what  
18 remains, what Lexington is really arguing is, we get  
19 sued, we lose on appraisal, we just lost makeup but  
20 what the Court should do then is enter summary judgment  
21 that we didn't breach our contract? That's not the way  
22 it works. What's left is narrow compared to the  
23 brokers for sure but in confirming the appraisal award,  
24 Wakefern asked for its interest and what Judge Francis  
25 found was that had to await another day the breach of

1 contract because of the issues around the timing.

2 And so what he found was, it's up to a jury  
3 to understand when did Lexington owe the money? When  
4 should it have paid? Did it delay and, therefore, what  
5 does it owe you for its delay and, therefore, what  
6 would be tried is the fact questions around the fact  
7 that Lexington didn't pay until after it was sued. It  
8 only paid part of an award in January of 2016, after it  
9 was confirmed by the Court.

10 On the spoilage issues, it was aware of the  
11 sales price and information relating to when Wakefern  
12 sold things, when it anticipated sales date, all of  
13 that. It would have known that it had to pay sales  
14 price, but it declined to pay until it's compelled and,  
15 therefore, what a jury should be permitted to decide  
16 is, should Lexington have paid earlier? Did it breach  
17 its contract and does it now owe interest, not only on  
18 the spoilage that it withheld until after appraisal  
19 but, also, on the makeup it withheld and the fact that  
20 it inflated its deductible.

21 The Court found that the named storm  
22 deductible applied and Lexington added 12.5 million in  
23 values into that deductible and withheld \$250,000 on  
24 that basis. A jury is entitled to hear that and  
25 consider were those actions in breach of Lexington's

1 contract and, eventually, a jury is entitled to hear  
2 the bad faith.

3 So it is the breach of contract that's left  
4 because losing doesn't excuse you from breaching your  
5 contract and it's the bad faith that's left, Your  
6 Honor, and those are claims that come with material  
7 issues of fact for a jury, including when Lexington  
8 should have paid the amounts because what it previously  
9 argued was that it supposedly didn't have the  
10 information to pay the spoilage claim earlier and so a  
11 jury will have to consider, did it have the sales  
12 price?

13 Did it know anticipated sales date from how  
14 it treated other claims, and did it decide not to  
15 examine that information or ask for it and if Your  
16 Honor is to look at documents, the one that I would  
17 point you to is, Exhibit I in the motion papers, the  
18 umpire who handled the appraisal, wrote to Judge  
19 Francis, and specifically made mention that there had  
20 been progress. The problem is, some information now  
21 felt important by Lexington had not been provided.  
22 But, in fairness, it was only very -- requested very  
23 recently.

24 So what a jury would consider is, if  
25 Lexington supposedly needed something to pay that claim

1 in 2016, why during its investigation did it not ask  
2 for it? I would submit that what the jury will  
3 eventually find is, Lexington didn't actually need it.

4 It knew. It chose not to pay and, now, it owes the  
5 interest and there is nothing in its contract that  
6 absolves it from paying pre and post-judgment interest.  
7 Thank you, Your Honor.

8 THE COURT: Okay. I'm sorry.

9 MR. WILSON: If I could just make a few  
10 points, Your Honor.

11 THE COURT: Absolutely.

12 MR. WILSON: I'll try to be very brief. When  
13 you have a breach of contract claim, you have to  
14 establish that there was a contract, you have to  
15 establish that there was a breach, and you have to  
16 establish that there were damages. That's where we  
17 have the problem here.

18 Ms. Pastor talked about, well, you don't  
19 dispute there's a contract. There was a breach. They  
20 did this, they did that wrong, they should have paid  
21 this. Those were all bad faith things. So even if the  
22 jury said, yes, Lexington did this wrong, did that  
23 wrong, and did that wrong, the next question is, what  
24 are the damages? There are no damages because the  
25 appraisers have already valued everything. They took

1 into account the policy language, how you determine  
2 everything.

3 In terms of interest, there is no New Jersey  
4 case law saying that you get interest if an insurance  
5 company breaches a contract absent bad faith. So the  
6 only way you can get interest is bad faith and a breach  
7 of contract. And so what are we going to do with the  
8 jury? The jury will find out that they breached the  
9 contract. Say they did that and we don't agree that we  
10 did, then we'll say, well, what are the damages? Well,  
11 the damages are zero because they fully recovered  
12 everything.

13 So then what do you do from there? So it  
14 would be a waste of time and resources for a Judge and  
15 a jury to sit through this case because there are no  
16 damages and a fundamental requirement of breach of  
17 contract claim is actual accruable damages.

18 THE COURT: Well, clearly, the bad faith  
19 claim would also be based -- predicated upon, in part,  
20 computation of damages, interpretation of the contract,  
21 and determination of whether there was a breach.  
22 However, the cases, which really are more appropriately  
23 -- more appropriately pertinent to the other side of  
24 these motions, the brokers, PORTAS V. TAN (phonetic)  
25 and LEVINSON V. D'ALFONSO, those -- those cases in the

1 context of malpractice hold that while, generally,  
2 breach of contract claims are subsumed under the  
3 professional negligence claims, that there could be an  
4 independent breach of contract claim based upon the  
5 actual contract, here, the insurance contract.

6 And all that the -- those cases, which  
7 discuss whether or not there's a separate cause of  
8 action for breach of contract in this case with a bad  
9 faith claim, look to assure that the -- that the  
10 plaintiff not be permitted to use a breach of contract  
11 claim, a hedge against a possible dismissal of the  
12 other claim and, in this case, there's independent  
13 arguments, independent basis for the plaintiff to claim  
14 a breach of the contract and to argue consequential  
15 damages. That's not for this Court to decide. These  
16 are issues of fact.

17 There are issues regarding how the -- what  
18 the defendant did in analyzing the contract. Did it  
19 correctly do it? Did it add things to the contract  
20 that weren't supposed to be added, et cetera? Those  
21 are all part of breach of contract. It's a specific  
22 claim and, therefore, I find that they're not subsumed  
23 by the bad faith claims and the motion is denied.

24 And I want to really, again, put on the  
25 record, which I think is appropriate in this case that

1 the breach and the arguments and the analyses by both  
2 Counsel in this case have made it easy. When I got  
3 this case, I thought, oh, my god, I have to -- I'm a  
4 recall Judge. I'm going to have to start coming in  
5 five days a week. But it turned out that it was -- it  
6 was an interesting process, but it was made -- it was  
7 -- it was rendered less complex by how able Counsel  
8 both authored their reports. You represented your  
9 clients very well. Thank you.

10 MS. PASTOR: Thank you, Your Honor.

11 THE COURT: All right. Next, -- the next  
12 motions, I think, are -- are the -- the next motions  
13 are between Associated Agencies and BWD Group, which  
14 I'll call the brokers moving for summary judgment to  
15 dismiss plaintiff's claims, monetary claims or the cap  
16 damages claims, damages in this matter and the -- so --  
17 and as I understand it, the first -- the first motion  
18 is to, number one, dismiss the complaint because while  
19 there might be -- there are no negligence claims.  
20 They're duplicative of those claims that are under the  
21 professional malpractice claims.

22 Second, that there is -- on the professional  
23 malpractice claim, there is no evidence that the  
24 defendant brokers caused any -- plaintiff any damages.  
25 It's a proximate cause argument. There's also an

1 argument that the breach of contract, negligence,  
2 breach of fiduciary duty claims are subsumed by the  
3 professional malpractice claims and cannot be  
4 independent pursued. And, finally, that a breach of  
5 contract claim also in these -- in the context of these  
6 cases would be subsumed.

7 And, here, as I understand it, the brokers,  
8 these two brokers, BWD Group and Associated Agencies,  
9 had provided services to the plaintiff, Wakefern, over  
10 a long period of time as their multitude of insurance  
11 contracts came due and those included what an entity  
12 such as Wakefern, which is a supermarket, retail,  
13 warehouse, distribution operation.

14 There are a multitude of insurance  
15 agreements, including workers' comp., transportation,  
16 directors and officers' liability, environmental claims  
17 and the like and the claims -- the casualty claims that  
18 are covered by the Lexington contract, which were --  
19 and the Lexington contract took effect in 2012. I  
20 think it was in October. I think it was October, 2012.  
21 The prior contract was an insurer called FM, and they  
22 had the contract for the period 2011. It expired in  
23 2012.

24 ShopRite -- the ShopRite chain, the ShopRite  
25 stores being supermarkets are a much different

1 enterprise than a manufacturing and, I think, Counsel  
2 in the prior case argued, we're not a manufacturing.  
3 We're a service and distribution center. Supermarkets,  
4 we all know, have a very low profit, low percentage  
5 margin of profit because of the nature of the flow of  
6 income and inventory.  
7           They also have a very, very, very high stock  
8 of items, which their food -- a lot of it is food,  
9 which could be spoiled. So their casualty insurance is  
10 extremely important to them, as are all the other  
11 insurance policies. So we have the insurance brokers.  
12           They're to use their expertise to represent  
13 the plaintiff and there is a client service agreement,  
14 which was entered into in 20-- December, 2010, and it  
15 was between Wakefern and its members and Associated  
16 Agencies and it describes services and it indicates  
17 there were -- they're one of two insurance brokers and  
18 they will provide the brokerage services memorializing  
19 the agreement and then there's a description of  
20 services in Paragraph 4 and it includes, specifications  
21 will include but are not necessarily limited to  
22 recommendations for appropriate insurance limits,  
23 effective policy periods, coverage wording and  
24 deductibles for self-insured retention and then it goes  
25 on and on and on.

1           Next is the BWD Group -- I thought I had it  
2 right in front of me. Oh, excellent. I put these  
3 together. Oh, okay. I had it buried under the NJAC  
4 provisions. Client services agreement for insurance  
5 broker and risk management services between Wakefern  
6 Food Corp. and BWD Group, LLC, and that was also for  
7 the period 2012 going forward and the recommended  
8 insurance coverage specifications would include under  
9 4.2 but not necessarily limited to recommendations for  
10 appropriate insurance limits, effective policy periods,  
11 coverage wording and deductibles, or self-insured  
12 retention, et cetera. So there we have the agreements.  
13 So there are two agreements between the parties.

14           The -- so the brokers surveyed that they're  
15 appointed tasks and they compared policies that were  
16 suitable for the ShopRite organization. Now, I  
17 recognize, there are so many ways in which supermarket  
18 and their distribution, transportation, et cetera,  
19 facilities are different from manufacturing but, also,  
20 because this is not a unified entity and because of the  
21 long-term relationship, I'm going to find that there's  
22 no dispute of fact that the defendant brokers knew  
23 that, among other things, in ascertaining what would be  
24 an appropriate policy included the price of the  
25 premium, the cost of the premium in the policy because

1 ShopRite has members, which in many cases, are single  
2 stores.

3 The size of the store varies. The volume of  
4 the store varies. The value of the store varies. They  
5 also have units, which are multi-store units and those  
6 individual owners and I will call corporate owners have  
7 divergent use of how do we evaluate what's important to  
8 us in obtaining an insurance policy? Is it the  
9 deductibles? Is it the risk? Is it the cost of -- the  
10 annual cost of the premium for the policy. So all of  
11 these things have to be taken into account, all of  
12 them.

13 What I read in 4.2 of each of those contracts  
14 provides that we're taking into account a lot of  
15 different things. So on paper, this is what the  
16 brokers contracted to do. Now, the defendants -- the  
17 plaintiff claims that when -- and the plaintiff has  
18 several committees. They have risk management  
19 committee, they have an insurance committee, and I'm  
20 just using these in generic terms. I'm not going to  
21 give the -- I'm not going to -- because I would have to  
22 go through all my writeups and find out what the names  
23 of the committees were. But these are committees  
24 consisting of representatives of a diverse group of  
25 owners. It's not just a department within a

1 corporation. In this case, it's a department of --  
2 it's a committee of diverse interests.

3 And the crux of plaintiff's claims is that  
4 there was a spreadsheet and the spreadsheet gave  
5 comparison of the -- oh, they accepted proposals and  
6 narrowed them down to two, which they thought were  
7 appropriate for consideration for the 2012/2013 period.  
8 And the existing insurer, FM, had a proposal. That  
9 proposal was based upon a savings in premium -- sorry  
10 -- was based upon a premium, which was, I believe, a  
11 little over \$5 million. I'm looking. I could find it,  
12 but there were -- there were two quotes, the FM and the  
13 contract with Lexington.

14 And Lexington's contract saved over a million  
15 dollars in premium costs. The deductibles were  
16 somewhat different because FM had \$100,000 deductible.  
17 Lexington had a \$25,000 deductible in general, except  
18 what Lexington had was a named storm deductible. The  
19 named storm deductible was two percent of the total  
20 insured value.

21 So the claim is -- and, of course, this is  
22 not -- not, of course, a finding of fact, but the claim  
23 is by the plaintiff that, throughout the process, the  
24 broker defendants were in constant contact with several  
25 individuals from Wakefern who handled insurance and

1 risk management and plaintiff had a retail insurance  
2 committee and they were presented with a spreadsheet,  
3 which showed that the total cost of the premium for the  
4 FM would have been almost 5.8 million for the period  
5 and for Lexington, it would have been four-and-a-half  
6 million dollars for the period. So it's about a  
7 million three difference.

8 And the claim of the plaintiff is that the  
9 defendants never specified to the plaintiff's insurance  
10 committee, to its -- we have Mr. Hoffman and Mr.  
11 Cameron. We have all kinds of communications that went  
12 back and forth but the claim is they never told us that  
13 the total insured value, deduction for a named store  
14 would be in this case a \$19 million and change  
15 difference between the deductible, had we used the FM  
16 policy.

17 Had we used the FM policy, we would have had  
18 a deductible of some approximately 4 million and under  
19 Lexington, it was 23 million, so there is an extra \$19  
20 million in risk for a named storm and they claim that  
21 that constituted a breach of contract, among other  
22 things, and a breach of it was professional negligence,  
23 not to specifically highlight Wakefern. We have this  
24 other policy. It's cheaper. It will save you a  
25 million three a year, but we want you to know that

1 there's a named storm deductible.

2 Now, named storm deductibles, hurricane

3 deductibles and the like are not necessarily new but

4 the claim is. This was new. After Hurricane Irene and

5 Katrina and all the devastation along the Gulf Coast

6 ports and Florida, and Mississippi and the like and

7 Hurricane Irene, which had a lot of damages in New

8 Jersey, the insurers were passing along some of their

9 risk by raising deductibles and imposing for their --

10 changing their hurricane deductible to a percent of

11 total insured value with the business, et cetera.

12 They're putting in -- they're decreasing their exposure

13 by raising the deductible.

14 And the position of the plaintiff was, as

15 professionals, they owed an obligation to us to have --

16 when they gave the spreadsheets, they should have in

17 its analysis highlighted and included there is for

18 named storms, two percent of total insured value and in

19 your case, the total insured value, they could have

20 even done it by one store, said, we'll take a -- we'll

21 take a representative store. This store has a total

22 insured value of this much money.

23 And if there's a hurricane which is named, a

24 storm which is named like Irene, you're going to have a

25 deductible of two percent of that amount, not the

1 \$25,000 that is or the 100,000 that is the general  
2 deductible for all other claims, other than a named  
3 storm, but you're going to have this happen. And the  
4 claim is, well, we were deprived of the opportunity to  
5 take into account, factor in that additional exposure,  
6 financial exposure to us in determining which policy to  
7 receive.

8           The defendants say, okay, assuming that a  
9 jury finds that, we're not saying that your  
10 professional negligence claims themselves have no  
11 merit. But what we're saying is, even if everything  
12 you said was true and even if we did all of that,  
13 you're not showing us that there's proof that --  
14 there's evidence to support a claim that you would have  
15 gone with another insurer because you're saving a lot  
16 of money on this and that was a prime reason for what  
17 you're doing.

18           And if -- you don't -- you also don't have  
19 any proximate cause because you can't show that there  
20 was within the price range that we have, another policy  
21 that's comparable that would have been cheaper and,  
22 also, you might not have even -- you might not have  
23 taken -- you might have taken the premium as the  
24 primary value to be taken into account in deciding  
25 which policy to take because of all your individual

1 stores who are most concerned about the premium, so  
2 there's no proximate cause.

3 Also, there's an argument that the other  
4 claims, breach of contract, breach of fiduciary duty,  
5 and negligence claims are duplicative of and subsumed  
6 within the claim for professional malpractice and so we  
7 -- I don't know whether it's going to be Mr. Wamser or  
8 Mr. Deal or Ms.-- who is going to be arguing for  
9 Associated Agencies?

10 MR. DEAL: Your Honor, I'm going to be  
11 arguing for Associated.

12 THE COURT: Okay. You're Mr. Deal?

13 MR. DEAL: Yes, sir.

14 THE COURT: Okay. Mr. Deal, go right ahead.

15 MR. DEAL: Okay. Thank you, Your Honor.  
16 Your Honor, although I don't necessarily feel that some  
17 of the issues you just reiterated are relevant to the  
18 motions that we're here for because we're really here  
19 on two or three limited --

20 THE COURT: Yes. I'm -- I'm giving a lot of  
21 what I read about --

22 MR. DEAL: I understand and I -- but I do  
23 feel compelled to touch on a couple of issues.

24 THE COURT: Go right ahead.

25 MR. DEAL: It's interesting that you chose to

1 compare the FM policy because, ultimately, when we get  
2 to proximate cause, we're going to talk about the fact  
3 that they haven't put up any policy that they feel was  
4 better at the time. They certainly haven't suggested  
5 that it was the FM policy.

6 But all I want to point out is, in your  
7 dissertation, Judge, what you missed was the  
8 differences between the FM policy and the Lexington  
9 policy were great and I only touched on a couple of  
10 them. I'll put the numbers and terms with regard to  
11 the premium in terms of percentages.

12 The first offer from FM was a 27 percent  
13 increase in their prior premium. The second offer was,  
14 I believe, a 49 percent increase. What they did was on  
15 their first offer -- and this is what's really critical  
16 and we're not really here for a policy evaluation  
17 because they haven't made one. We're here to say that  
18 they haven't made one. But they lowered or they raised  
19 the deductibles and they lowered the sublimits is what  
20 FM decided to do.

21 So as a result of the hits they took from  
22 Irene and a snowstorm that was unexpected and the  
23 millions of dollars in claims that they had to pay  
24 under what was a prior 18-month policy, they not only  
25 wanted to jack up the premium first 27 percent and then

1 upwards of 40 -- I had 47, 49 percent, but they wanted  
2 to raise the deductibles and lower the sublimits, which  
3 at that point became a no can do, so to speak, with  
4 Wakefern. So that was the first issue I just wanted to  
5 point out, even though, again, I don't think that it's  
6 relevant to our proximate cause argument.

7           The second issue, again, that Your Honor  
8 discussed that I don't know is necessarily relevant but  
9 in paraphrasing the defenses, I just want to throw out  
10 there, if we were here to argue the breach issue, if we  
11 were here to argue whether or not the brokers breached  
12 their standard of care and/or breached their contract  
13 and, therefore, the issue of what the broker's defense  
14 is to that issue is relevant, I think what needs to be  
15 at least placed onto the record is the fact that, if  
16 you buy into their statement that the brokers never  
17 said, by the way, you have a two percent named storm  
18 deductible in your policy and that two percent just at  
19 one store can cost you X, okay, that's not really what  
20 they're saying.

21           What their guy is saying, they didn't tell us  
22 the two percent of named storm applied to our  
23 inventory, okay? So the retort to that is, so the two  
24 percent applied to your bricks and sticks. So you knew  
25 that you have all of these buildings all over New

1 Jersey that have some great value. You had an idea  
2 that this policy, this -- had a two percent named storm  
3 deductible that would have applied to your real estate  
4 and, in fact, in Sandy, it applied to one building at a  
5 cost of \$15 million. So they at least were aware of  
6 that, and I only want to right the record on those  
7 issues, Judge.

8 In terms of the proximate cause issue, --  
9 and, again, I'm trying to read my notes from what you  
10 were going through here. Basically, Your Honor, I  
11 guess, what I want to go back to is it's a basic tenant  
12 in law and I think Mr. Wilson addressed this this  
13 morning, although I'm going to go a little bit further.  
14 Whether you look at negligence law or contract law  
15 because they have those both theories at this point and  
16 we're going to circle back to that issue but, you know,  
17 it's a basic tenant of law that you have to prove that  
18 it's negligence, breach of a standard of care,  
19 proximate cause, and damages. The jury gets a  
20 questionnaire whether it's a slip and fall case or  
21 whether it's a malpractice case or an ENO case. Those  
22 are the things they have to issue.

23 We're not here to argue the breach because,  
24 clearly, there are disputes of fact and there are  
25 certainly experts who dispute the issue. We are here

1 limited to the proximate cause issue and I -- we took  
2 the liberty of getting a copy of the record from our  
3 last argument, just to help refocus our argument here  
4 and I think where we got caught up last time -- and  
5 when I say we, I'm talking about the Court and the  
6 parties and mainly because it's Wakefern's argument is  
7 they keep coming back to the breach issue and they keep  
8 ignoring the fact that the law says, they have to show,  
9 they have to compare, they have to show to get to  
10 damages that there was a policy that was available that  
11 was better than this policy.

12 And just saying, oh, by the way, you guys  
13 talk to FM and you guys talk to Lexington isn't enough.  
14 They need expert proofs. They need an expert to  
15 compare the policy and not compare the policies after  
16 Hurricane Sandy, okay, but to first compare the  
17 policies before to see what was the better policy  
18 because one of the arguments they're making is that our  
19 client, Phil Corso (phonetic) from Associated, said it  
20 was a superior policy, superior to what there was at  
21 the time.

22 But they need to be able to show that there  
23 was a policy that would have paid them more than the  
24 \$26 million that Lexington paid them and they haven't  
25 done that. Their expert wasn't able to do it. When we

1 questioned our expert about it, he kind of flubbed  
2 through his testimony and he said, well, the Zurich  
3 policy. Well, what Zurich policy? Well, -- well, why  
4 the Zurich policy? Heh doesn't even say which Zurich  
5 policy. Why the Zurich policy? Well, because they're  
6 the insurer now and they didn't required two percent  
7 named storm deductible, so you have to assume they  
8 probably wouldn't have required that. Well, that's not  
9 going to be good enough. He's not going to get that  
10 before the jury and that's just not a --

11           Actually, he went onto acknowledge that he  
12 really didn't do an analysis of what policies were  
13 available on the market for an entity such as Wakefern  
14 in 2012. Then you go to their risk manager. Their  
15 risk manager, Craig Hoffman, who was produced not only  
16 as a fact witness but was produced as their corporate  
17 designee as to damages and when he's asked a question,  
18 so, you know, you weren't happy with this policy. In  
19 fact, there's an early e-mail from him where he sends  
20 out something to a group of people saying I was sold a  
21 bad policy. So you feel this was a bad policy, sir,  
22 well, use the term bad policy. Which policy do you  
23 think you should have had?

24           Well, he says the Zurich policy from 2013.  
25 Well, why? Well, I'm not really sure other than they

1 didn't require us to get a named storm deductible. So,  
2 you know, you have both their expert and their witness  
3 talking about 2013. And then their response to motion,  
4 for the first time, I mean, three-and-a-half years,  
5 now, we're going on four years in this case. They've  
6 never identified this witness from Aon (phonetic), this  
7 Joanne Quintal (phonetic), as someone who is going to  
8 give opinion testimony in this case, more or less  
9 expert testimony. But she's deposed on issues that are  
10 not really relevant to the issue before the Court  
11 today.

12 But what Wakefern argues in opposition to our  
13 motion on proximate cause is that this Joanne Quintal,  
14 who worked for Aon and Aon was the subsequent broker  
15 and Aon was the broker that secured the Zurich policy  
16 the following year, she's going to talk about what she  
17 was able to do in 2013 to get a policy without a named  
18 storm deductible.

19 The problem is, number one, as I said, she's  
20 never been identified as an expert, never been  
21 identified as someone that's going to give that  
22 opinion. She certainly didn't give that opinion when  
23 she was deposed and I know Counsel is going to argue  
24 she was never asked that. She certainly didn't give  
25 the opinion. We asked her a lot over two days.

1           And 2013 isn't relevant. The relevant time  
2 period is 2012. So what we have here is, they can't  
3 bridge the alleged breach which, you know, for purposes  
4 of argument today, there is no argument on. Two, there  
5 are damages in the case. They can't make a proximate  
6 cause argument because they don't -- there's no damages  
7 that they can allege we caused unless they can show  
8 there was a better policy out there that these brokers  
9 failed to show us. And, Your Honor, that's our  
10 argument on proximate cause.

11           The way we handled it last time, I think it's  
12 probably easier to handle it handle it if we all just  
13 deal with that issue and then move onto the next one.  
14 Is that okay?

15           THE COURT: Sure. Although I think the  
16 others are simple enough.

17           MR. DEAL: That's fine.

18           THE COURT: Let's do it all at one time.

19           MR. DEAL: That's okay, Judge. Yes. In  
20 terms of the issues regarding the -- and I know we  
21 phrased our motion as a motion to dismiss or it's  
22 really, you know, a partial motion for summary  
23 judgment. I've heard the same issue be called merger  
24 of claims.

25           If you look at what the plaintiff's claims

1 are, -- and I say if you look at them, if you look  
2 actually at their complaint and you look at the  
3 allegations and you look at what they're saying,

4 basically, they're all the same allegation. The crux  
5 of their case is, basically, that the brokers breached  
6 their common law duties. Their common law duties are  
7 to act with reasonable skill, care, and diligence.

8 Now, Your Honor referenced the CSAs, the  
9 client services agreements, which lay out duties,  
10 various duties that the brokers agreed to perform. But  
11 the CSAs, those contracts don't change what the  
12 broker's duty are and the law. They just give them  
13 additional things they have to do. It doesn't mean  
14 that if they don't do those, you don't go back to that  
15 they failed to act with reasonable skill, care, and  
16 diligence. Okay?

17 There may be an issue in this case somewhere  
18 along the line -- and, again, we're not arguing here --  
19 as to whether those duties within the client services  
20 agreement created a special duty of care or a special  
21 standard of care, but that's not what we're here to  
22 argue. All we're here to argue is whether or not the  
23 claims that Lex-- or that Wakefern brought up or that  
24 Wakefern alleged in their complaint, the breach of  
25 contract, breach of fiduciary duty, negligence, and the

1 professional negligence claims are more or less the  
2 same claims and Your Honor has read everything and  
3 you've read the arguments from previously and you can  
4 see and, again, I would just ask you to take a look  
5 back at the contract, that they're more less the same  
6 claims. They more or less -- this is -- I said this  
7 before. You know, I've been practicing law a long  
8 time. In professional negligence cases, whereas you'll  
9 often see the pleadings come out this way and what I  
10 mean by that is, the pleadings to include a breach of  
11 contract.

12 I think a lot of the case law on this issue  
13 involves attorney malpractice cases. So the breach of  
14 contract claim, often times, it's fee agreements or  
15 it's, you know, plaintiff -- plaintiff personal injury  
16 attorneys where they have a fee agreement and it's  
17 alleged that they breached the fee agreement, so  
18 there's a professional negligence and a breach of  
19 contract. All of those things basically come under the  
20 same standard of care and for purposes of this case, we  
21 feel that those claims should all be merged, dismissed,  
22 really go to the jury as a professional negligence  
23 claim.

24 The last issue, Your Honor, which is the  
25 measure of damages for Wakefern and, again, I was, you

1 know, listening to the arguments this morning and I was  
2 listening to Your Honor and you talked about contract  
3 interpretation. I think this is simply nothing more  
4 than a contract interpretation.

5 I think the argument here is how do you  
6 interpret what the damages are that Wakefern can attain  
7 or can get in this case and you have to look back at  
8 the Lexington policy and you have to look at the  
9 sublimits of liability and you have to make a  
10 determination that their damages, their spoiled food so  
11 to speak, and I know there's more to their damages, but  
12 that's the greatest part of their damages, were created  
13 by off-premises service interruption and, therefore,  
14 the appropriate sublimit that should be applied is a  
15 \$25 million sublimit. There's another sublimit, \$15  
16 million that all applies to the Hoboken store, which  
17 we're really not -- there's no dispute over. But  
18 Wakefern's damages should be limited to that \$25  
19 million sublimit pursuant to what they had available to  
20 them under the Lexington policy. Thank you, Your  
21 Honor.

22 THE COURT: Okay. Thank you very much.  
23 Okay. Now, I'll hear from --

24 MR. WAMSER: Yes.

25 THE COURT: I'm sorry. Yes?

1 MR. WAMSER: Thank you, Your Honor.

2 THE COURT: From BWD.

3 MR. WAMSER: BWD. Just a couple of points, I  
4 think, --

5 THE COURT: Sure.

6 MR. WAMSER: -- between the last oral  
7 argument that you reviewed and Mr. Deal that had been  
8 given enough information.

9 The only thing I wanted to mention is that,  
10 speaking just on the reversal here, the sublimit issue  
11 and I think Mr. Wilson actually mentioned before where,  
12 you know, every -- you know, you really need to try to  
13 give the -- every part of the contract meaning and the  
14 language should have meaning and, in the sublimit, in  
15 the service interruption sublimit and the Lexington  
16 policy states that or provides that the service  
17 interruption sublimit is part of and not in addition to  
18 the named store sublimit.

19 So that contemplates that there is -- if  
20 there could be a service interruption caused by a named  
21 storm. So I know the plaintiff argued that there's a  
22 law of the case based on Judge Francis' decision early  
23 on in the case that it's a named storm and, therefore,  
24 it's the law of the case and the named storm sublimit  
25 should apply, but that's just not the case here and

1 that wasn't the holding in Judge Francis' decision  
2 either, that there -- and definitely in particular with  
3 the language here that you could have a service  
4 interruption loss that was caused by a named storm and,  
5 therefore, the service interruption sublimit should  
6 apply, more specifically, the off-premises service  
7 interruption sublimit.

8 Just to touch on the causation issue, I think  
9 it's more than just that the plaintiffs can't point to  
10 any policy. It's really not just any policy. The  
11 plaintiff could speculate and say, well, you could have  
12 gone to 50 more insurance markets. You could have --  
13 and they could have offered a premium that was twice as  
14 much.

15 You know, the plaintiff had -- it's their  
16 burden to show that there was not only a policy out  
17 there that possibly would have paid more than the  
18 Lexington policy but that they would have paid for it  
19 and would have been at or around the same price. It's  
20 not just then they can sit back and now turn around in  
21 hindsight and say, well, we would have paid double the  
22 premium, if it didn't have a named storm deductible.  
23 It's just not the evidence in this case.

24 All the evidence in this case points to very  
25 limited options. You have the FM renewal, which was an

1 exorbitant increase in the premium, and you had Zurich,  
2 but that had a \$1 million self-insured retention and,  
3 also, a named storm sublimit, so it doesn't get you  
4 anywhere, either of those options.

5 And the last thing is that there's some  
6 discussion about Joanne Quintal, the Aon broker, and  
7 also their expert, Mr. Lipschultz (phonetic) talking  
8 about any option in 2012. There's no other -- there's  
9 no evidence at all about any other options than what  
10 I've already discussed in 2012.

11 Ms. Quintal, all she could discuss and all  
12 she testified to was 2013. There is no evidence that  
13 she had any knowledge of the market in 2012. I mean,  
14 if she did, it would be completely irrelevant to this  
15 particular account. They need to show that someone who  
16 knew the market of a supermarket in this area, in this  
17 geographical location and with the carriers and their  
18 contacts in this location. You can't point to the  
19 entire country in the world and say there is some other  
20 policy out there or some other insurance company. So  
21 and that, again, is plaintiff's burden to show in order  
22 to establish the causation. And that's all we have,  
23 Your Honor. Thank you.

24 THE COURT: Thank you. Counsel?

25 MS. PASTOR: Thank you, Your Honor. Let me

1 start with a few issues and I'm going to start first  
2 with this notion of causation. What you're hearing is  
3 causation on the professional malpractice claim and the  
4 brokers are just assuming somehow everything else  
5 disappears and what they're ignoring is there's nowhere  
6 in the contracts and their contracts are very detailed  
7 and as the evidence is going to show at trial, they  
8 drafted them but in their agreements detailing all the  
9 services they're going to provide, there's nothing in  
10 here that says, and you're limited to the following  
11 types of damages.

12 In fact, Wakefern's contract has no  
13 limitation. It's entitled to typical contract damages.  
14 Now, here's why, though, this contract couldn't  
15 possibly merge with the professional malpractice claims  
16 or, frankly, any of the claims could possibly merge.  
17 They are all distinct. Let me give you an example.

18 In each of the contracts, under the  
19 description of services, 4.3E is that they will provide  
20 technical assistance with the interpretation of policy  
21 terms and conditions. What that meant was, BWD told  
22 Wakefern it had attorneys on its staff. Its  
23 professional assistance was going to include having  
24 attorneys provide coverage interpretations. That  
25 didn't happen here.

1           Whatever a broker, a plain vanilla broker may  
2           owe under New Jersey law, these broker consultants owed  
3           more and that included having their attorneys review  
4           the policies the way they promised they were going to  
5           do that in their contract with Wakefern. So the cases  
6           that they cite about this merger proposition have no  
7           basis where the contract is broader than and different  
8           than the standards that would apply.

9           Now, for sure, brokers are fiduciaries in New  
10          Jersey, but your average retail broker doesn't provide  
11          legal interpretations from their attorney staff. The  
12          other thing that it ignores is the special  
13          relationship. The claims pled are not just contract  
14          and negligence. Among the tort claims are breach of  
15          fiduciary duty because of a special relationship.

16          What the brokers ignore is that they told the  
17          client over 30 and 50 years, the services they would  
18          provide and promised that they were going to go beyond  
19          and promised that they understood these companies  
20          better because of their long-standing relationships  
21          with them because they placed not only coverage for  
22          Wakefern Food Corp. and the members of this policy  
23          property but the other litany of policies because they  
24          were the exclusive brokers for that.

25          But they also went to each of the individual

1 members and they marketed to them and they provided  
2 their auto insurance and their personal insurance and  
3 other things at the store. And so the claims are  
4 different and can't all merge together because these  
5 are not just your plain vanilla brokers and when you're  
6 a fiduciary like these brokers were with a special  
7 relationship, under New Jersey law, you're required to  
8 do more.

9           For example, there's case law in New Jersey  
10 that you're required to tell your client, if you think  
11 there's no market and they can't buy something to  
12 protect themselves, then you raise your hand and you  
13 tell them that. You don't tell them that you've  
14 fulfilled your contract's obligations to provide them  
15 with the best available insurance to best protect them  
16 to the highest standards that you've promised and then  
17 say, you know what, now that we're sued and you didn't  
18 get the coverage, we didn't tell you about all these  
19 flaws and warts on it, now, it's really your fault and  
20 there wasn't anything better out there. Now is not the  
21 time to say that.

22           The time to have said that, if it were true,  
23 and I submit it's not, is when they were sitting in the  
24 retail insurance committee meeting with owners of these  
25 companies and they didn't say it.

1           Now, Your Honor referenced the premium. Even  
2   that is a fact issue and here's why, because the  
3   brokers will try to argue -- and some of their people  
4   have testified about, you know, the premium was  
5   important, this policy was less and we have an expert  
6   who will say, that's the problem. They were,  
7   apparently, at least if you believe that testimony,  
8   more concerned about saving a little money than the \$19  
9   million difference in deductibles between an expiring  
10   and this policy.

11           What Wakefern's people testify are, we didn't  
12   have a budget. We wanted the best product for the best  
13   price. If you're telling us they're comparable and I'm  
14   going to save a little money, sure, go with the same  
15   thing that's less. But if they're not the same, you  
16   needed to tell us and they didn't tell them and there  
17   were consequences.

18           Now, on causation, what is it that the  
19   evidence is going to show? Well, in our papers, we  
20   showed you some of the differences where they say  
21   there's no proof you could have bought a better  
22   product. Well, there is a broker who while the  
23   Lexington policy is still enforced begins negotiating  
24   for the next year. She negotiates not only with  
25   Lexington about renewing Lexington's policy but they go

1 out and she testifies and we've given you her testimony  
2 to a market full of other insurers that include Zurich.

3 Now, why is Zurich important? Well, they  
4 claim that they went to Zurich, too, that they  
5 recommended the Lexington policy over Zurich. And what  
6 did the Zurich people write after Sandy, after 50 plus  
7 million dollars in losses? They wrote a policy that  
8 didn't have a two percent total insured value  
9 deductible. They were willing to write even after  
10 Sandy and for this insured while the Lexington policy  
11 was enforced a policy that would follow it that would  
12 have a \$1 million flat deductible.

13 And so there will be testimony not only from  
14 Ms. Quintal about that but, frankly, Wakefern, who  
15 bought the policy and the Court can read the policy and  
16 the jury can see the policy. What no one ever said  
17 back then is, you should buy the Zurich policy. They  
18 were told, no, no, no, Zurich has got a \$1 million  
19 deductible. This Lexington policy is much better.  
20 It's got a base 25. Well, as it turns out, it had a  
21 lot more than that and the brokers did not reveal it.

22 The other point, Your Honor, is you were  
23 talking about the comparison and the one document that  
24 was shown. That wasn't shown to the Retail Insurance  
25 Committee. That was shown to one person, Mr. Hoffman,

1 they allege and there will be fact questions about what  
2 was shown to Mr. Hoffman and what was said to Mr.  
3 Hoffman. Where there is no fact question and they

4 agree is, they sat in a meeting on September 24th of  
5 2012. They watched a slide come up in front of all of  
6 the Retail Insurance Committee members, including  
7 owners, that said \$25,000 deductible and no one said,  
8 that's not the deductible for the Lexington policy.  
9 You guys need to understand this named storm  
10 deductible. Let us tell you why you should still buy  
11 this policy even though it has that.

12 And, in fact, BWD was asked, why -- did you  
13 know when you sat there about that deductible? And  
14 they will have a person who will testify, he claims,  
15 claimed at his deposition, I was fully aware. I knew  
16 that there was a deductible of that particular  
17 magnitude and I chose not to say anything. A jury  
18 needs to consider that, Your Honor, in terms of not  
19 only causation but in terms of the damages because  
20 Wakefern had options. It didn't have to buy this  
21 policy but if it had known about what this policy had,  
22 it certainly could have considered things.

23 What could it have considered? It could have  
24 considered extending the policy the year before. It  
25 could have considered buying the policy the year

1 before. It could have said, go back out and talk to  
2 Zurich and see if you can get the same policy where we  
3 were able to buy the following year at a better -- with  
4 better terms, none of which happened in this case.

5 Now, in terms of their motion, their motion  
6 is replete with fact questions and I didn't frame their  
7 motion, they did. So to walk away from all of the fact  
8 questions and the fact that you gave exhibits up to, I  
9 think it's double lettered exhibits like BBB, that  
10 wasn't my doing, that was theirs.

11 But if there's any question there were fact -  
12 - or any issue that there are fact questions, the Court  
13 need look no further than their material statement of  
14 fact, which they say supports their motion,  
15 specifically at Items 48, 49, and 54 because, there,  
16 they claim, BWD received a quote from Lexington for the  
17 Lexington policy at issue. Well, they've never  
18 produced that quote, so that's disputed. They produced  
19 a quote for a different product with a \$1 million base  
20 deductible. They didn't give Wakefern a quote for this  
21 and if they say they did, it's a fact question and it's  
22 an issue for the jury.

23 But they claim that in terms of that quote  
24 that they supposedly provided, that they -- that at a  
25 meeting, Mr. Hoffman was provided with all of the

1 essentials about the proposal and a copy of that  
2 proposal. That's disputed. Mr. Hoffman will testify  
3 and Wakefern has no document that is the "for this  
4 policy nor was it given to the Retail Insurance  
5 Committee, nor did they produce it. So there are fact  
6 questions that require that the motion be denied.

7 In terms of the issue of the -- you know,  
8 what will we produce? Well, we'll product the expert,  
9 Mr. Lipschultz, who is going to say these guys were so  
10 busy focused on, you know, premiums that they missed  
11 the forest for the trees, that they didn't tell  
12 Wakefern, that they didn't give Wakefern options, and  
13 that we have a Zurich policy a year later.

14 In their briefing, they argue, well, you  
15 can't look at what Aon did. Aon is a big broker. They  
16 have -- you know, it's speculative. They were a  
17 fabulous broker. We might not have been able to get  
18 that kind of good stuff like Aon did.

19 Here's why it's important not to merge the  
20 claims, because that kind of admission is exactly what  
21 shows that they breached their contract because, in  
22 their contract, they said, they were going to perform  
23 to the highest standards in the industry. So you don't  
24 get to stand here now and say, some better broker could  
25 have done a better job than we did because you promised

1 to function just like that other broker.

2 As far as the damages and this issue of the  
3 cap, as I said, New Jersey law doesn't say, when you do  
4 a bad job and when you breach your contract, there's  
5 some limitation. When you don't tell your policyholder  
6 that they're buying a bad contract, that the policy  
7 with warts becomes the cap or the most that you can  
8 collect.

9 Any kind of sublimits, whatever the  
10 deductible may have been, the sublimits may have been,  
11 that was in a contract with Lexington. That's not  
12 their contract. There's no limitation in theirs. But  
13 more importantly than that, there's no New Jersey law  
14 that says, you're limited. If your broker buys you a  
15 bad policy, not only when they get held liable, they're  
16 liable then for only the amount of damages in the bad  
17 policy that they bought you.

18 So, you know, going back to what are the  
19 issues here for the jury and on this issue of  
20 causation, the jury is entitled to hear what they  
21 provided, what they didn't provide, whether Wakefern  
22 had options, including the ones that they could have  
23 explored like the Zurich policy. Ms. Quintal testified  
24 that the year after, she could have also gotten the  
25 same policy from London. London was willing to write a

1 policy with a flat \$1 million deductible.

2 So there are proximate cause issues for the  
3 jury. There are fact questions for the jury, and we  
4 submit that their motion should be denied. Thank you.

5 THE COURT: Okay.

6 MR. DEAL: Your Honor, may I be heard briefly  
7 on a couple of issues? Just as I suspected, Wakefern  
8 would have attempted to lead the Court down into the  
9 rabbit hole of breach. Ms. Pastor argued for, you  
10 know, they first two-thirds, basically, on the breach  
11 issue and all the bad things that the brokers did to  
12 breach their contract and there's a reason for that, as  
13 I stated earlier, which is that they can't meet their  
14 standard of proximate cause. They keep talking about a  
15 2013 policy that Aon was able to find ten months after  
16 Sandy, point being, you know, saying -- to suggest it  
17 was in the same timeframe as the marketing of the  
18 policy at issue here is clearly disingenuous.

19 They keep trying to draw the Court and  
20 everyone away from the fact that they don't have  
21 evidence of a policy that was available in September,  
22 2012, October 1, 2012, that would have paid more than  
23 the \$26 million that they got from this policy.

24 In terms of the merger claims, dismissal of  
25 claims, whatever we want to call it, I think that the

1 problem that Wakefern is having here is they keep  
2 assuming that our argument is that they are not allowed  
3 to introduce evidence at trial of the client services  
4 agreement, if the case only goes to the jury on  
5 professional negligence. That's not the argument that  
6 we're making. Certainly, the duties and  
7 responsibilities that the brokers had under the two  
8 different client services agreements will go before the  
9 jury.

10 Our argument is simply that those all fall  
11 within their standard duties of care. They might have  
12 done a little bit more than the corner broker or  
13 whatever they're calling the, you know, some different  
14 broker. But that doesn't raise their standard of care  
15 anything more.

16 There will be at trial -- there will be an  
17 issue of whether there's a special duty or  
18 relationship. They'll have the ability to argue that  
19 that contract raises an issue of a special duty or  
20 relationship. But what we're suggesting is that it's  
21 still the same duty whether it's under professional  
22 negligence, negligence, breach of fiduciary, breach of  
23 contract, and that the issue should only go to the jury  
24 on what.

25 In terms of the damages issue, again, it's a

1 contract interpretation of the policy. Certainly,  
2 there's case law that suggests that they're limited to  
3 what they would have gotten under the policy and that's  
4 why we make the argument that we made.

5 THE COURT: Okay. All right. Again, I  
6 appreciate your Counsel -- all Counsel enlightening me  
7 on some of the things that I may have said that were  
8 too general. But in this -- in considering the  
9 defendant's motion, the defendant contends that there's  
10 no evidence, no proofs proffered by plaintiff to  
11 indicate that any alleged breach by defendants  
12 proximately caused damages because they have not  
13 presented evidence that there was a better policy  
14 available than the Lexington policy.

15 And so what do we -- what do we have here  
16 that's a little different from these other matters?  
17 The -- it's not only another policy that's at issue  
18 here but it's were they deprived of the opportunity to  
19 consider other options? Did they perform in such a way  
20 that the plaintiff contends that it will be able to  
21 provide evidence, that there were other products did  
22 not have a two percent named deductible. Maybe they  
23 can, maybe they can't. That's for the trial Judge to  
24 decide, not me.

25 Proximate cause, generally, is a jury

1 decision, not a Judge decision. I can't sit her and  
2 talk about specifics, that there was a Zurich policy.  
3 If there was a Zurich policy in 2012, was -- did they  
4 have any different policy in 2011? I don't know.  
5 Perhaps, there's a witness who can answer that  
6 question, this Aon. I don't know.

7 But that's -- this is -- here's what the  
8 problem, I think, is on the argument (indiscernible)  
9 defendant, that they're arguing that there's a bright  
10 line between finding a breach of the duty of  
11 professional conduct, in this case, of a broker, or  
12 even a special relationship and, certainly, that's a  
13 primary issue in this case because one of the cases  
14 cited was TRIARSI V. BSC GROUP, 422 New Jersey Super.  
15 104.

16 There's -- a special relationship is defined  
17 as being where the insurance agent "assumed duties in  
18 addition to those normally associated with the agent  
19 insured relationship. And the -- these cases allude to  
20 in special relationship and proximate cause, a case  
21 decided in 1984 by the Appellate Division, SOBOTOR V.  
22 PRUDENTIAL PROPERTY AND CASUALTY, and acts of omission  
23 may give rise to a violation of duty of care.

24 Here's what the Court found in that case.  
25 The Appellate Division found -- the Court found that

1 the broker held a "special relationship" to the  
2 individual insured, who was unsophisticated in auto  
3 insurance policies and relied on a broker's expertise  
4 as to determine whether a non-driver was covered under  
5 their policy.

6 Discussion included the length of the insured  
7 broker's relationship to consider all surrounding facts  
8 to determine whether the client, regardless of its size  
9 and sophistication and the acts of omission may give  
10 rise -- that acts of omission may give rise to a  
11 violation of the duty of care.

12 So what do we have here? We have a long-term  
13 relationship. We have insurance broker -- and, again,  
14 I'm not saying that these insurer broker client service  
15 agreements from Associated and BWD are any different  
16 from a -- well, let's take -- let's take New Jersey.  
17 Let's take one of my former clients, Barnabas Health.  
18 They have an insurance broker, I'm sure, maybe more  
19 than one, I don't know. I haven't represented them  
20 since 1996. So I guarantee you, with a healthcare  
21 provider, their broker agreement is probably ten times  
22 the length of this but no more detailed than these, no  
23 more detailed.

24 These give very clear and specific guarantees  
25 to the plaintiff, not of we're going to guarantee you

1 we're going to do something in your favor but  
2 guarantees that you can rely on us because we know you.  
3 We can give you beyond just evaluating policies, which

4 are numbers. We're going to tell you. We going to  
5 have lawyers who will analyze these policies, 4E of  
6 both of them.

7 We're going to look at selected markets,  
8 technical assistance. We're going to provide Wakefern  
9 Section F, all quotations received from the markets,  
10 along with the detailed recommendations, which they  
11 offer the best coverage, again, Associated Agencies'  
12 professional expertise will be provided memorializing  
13 issues such as the scope of the policies, coverage  
14 pricing, carries the ability to properly adjust claims,  
15 the next endorsements, et cetera.

16 And so does BWD. There's a significant  
17 factual issue whether or not these very specific long-  
18 term relationships, that's a factor which is probably  
19 one of the most important factors that our Courts have  
20 used to determine whether or not there was a special  
21 relationship between the parties.

22 Next, in -- Counsel for defendant is correct.  
23 Many of these cases arise out of a relationship of --  
24 I'm sorry -- a claim of professional negligence by  
25 attorneys. So in PORTAS V. TAN, -- PORTAS V. TAN is --

1 I believe it was later published. So PORTAS V. TAN is  
2 an Appellate Division decision from 2014 and it talks  
3 about usually breach of contract terms are subsumed not  
4 the professional negligence claim unless, for example,  
5 the attorney breached a specific provision of the  
6 retainer agreement.

7 Well, here, we have -- and then LEVINSON V.  
8 D'ALFONSO AND STEIN, 320 New Jersey Super. 312 (1999)  
9 Appellate Division. There was a retainer agreement,  
10 which provided that the -- the insurer would not settle  
11 without the client's consent and while the Court said  
12 that you can't -- you must guard against routinely  
13 allowing a plaintiff to use a breach of contract claim  
14 to hedge against possible dismissal of the malpractice  
15 claims, this is not that case.

16 This is a case where there are -- is a long-  
17 term relationship specific tasks undertaken by these  
18 two brokers for this specific client, the industry, the  
19 fact that it is -- has a -- it is an accumulation of  
20 individual owners, it's not just a monolithic company  
21 who have various issues. They know they're going to  
22 have to go before an insurance committee and defend.  
23 Whether or not the -- these are all contract terms.

24 Was there another policy? Well, the  
25 plaintiff can't prove a negative. They weren't given a

1 panoply of policies to look at. They don't have  
2 someone having said, here's the two percent and it's  
3 going to cost you, if there is a named storm, untold  
4 millions of dollars, if there's a named storm.  
5 Remember, that named storm, yes, we had a big storm in  
6 2011 but -- and they had Katrina down south, but we  
7 haven't had a named storm so destructive. We haven't  
8 had a Sandy yet in New Jersey. It's the hundred year  
9 storm. That's minimal as opposed to the savings we're  
10 going to give you in the premium. They didn't give the  
11 opportunity of the plaintiff to have that opportunity  
12 to compare.

13           They -- there are questions of fact. It is  
14 replete as to whether or not had they done a more --  
15 knowing that there's a two percent total insured value  
16 deductible, what did they do to find out whether or not  
17 there were other policies -- and, again, the policy  
18 that was presented to them that would have been a  
19 renewal with the increased 27 percent premium, hundred  
20 thousand deductible, all of that, there's a question  
21 that that had a named storm deductible. Probably not.

22           But all of this raises -- raises issues.  
23 There's a -- just like the retainer agreement, this  
24 isn't just we're going to do specialized services as  
25 brokers under the general theory that we have a

1 fiduciary responsibility to you under N.J.A.C. 11:17A-  
2 4.10, an insurance producer acts in a fiduciary  
3 capacity in the conduct of his or her insurance

4 business.

5 Well, if that's all there is, yes, I probably  
6 would -- if that's all there was, I might have some  
7 reason to listen to the defense. But this isn't that.  
8 This is a contract. The jury is going to have two  
9 contracts in front of it. They're going to be walked  
10 through those contracts point by point. They're going  
11 to have to determine whether or not those contracts  
12 gave their -- elevated their professional conduct to a  
13 standard not of a regular insurance broker but a  
14 special relationship broker and whether or not they  
15 breached that duty.

16 I mean, essentially, of course, probably the  
17 jury question is going to be, did they -- did they --  
18 did they breach their duty of -- based upon industry  
19 standards as an insurance broker and it's not broken  
20 down into the -- if I said that's -- it's not the  
21 standard with the special relationship broker, it's the  
22 standard of a broker.

23 But then there are contract issues that go  
24 into the special relationship. They're much more  
25 distinct than the -- than the -- than the general

1 negligence, professional negligence claims and the  
2 professional negligence claims, I find that there are  
3 certainly factual issues as to whether or not the --  
4 they were told about the consequences of the two  
5 percent named deductible.

6           While it's outside the scope of what was  
7 submitted here but I'm a homeowner. Any homeowner who  
8 owns a home along the Jersey shore, about at least a  
9 half a million of us, whoever we have insurance  
10 through, when we got our renewal, the insurance  
11 companies tell us, hey, by the way, named storm, two  
12 percent, three percent, four percent, five percent,  
13 depending where you are and, in addition, they tell you  
14 when they give you your questionnaire to decide whether  
15 you're going to buy a policy for the next year, and  
16 they tell you, and in your case, your house is valued  
17 at a half a million dollars, a million dollars. Your  
18 three percent is worth \$30,000. Your three percent is  
19 worth \$15,000. Whatever it is, they tell you that.

20           So plaintiffs are saying, we were deprived of  
21 that. It's both a contract issue and a professional  
22 negligence issue. They're inseparable.

23           So as to the plaintiff's motion, -- and  
24 proximate cause, certainly consequences flow from if  
25 they didn't inform -- properly inform the plaintiff of

1 its additional exposure under the two percent total  
2 insured value, there are many -- many disputed facts,  
3 which would indicate whether or not by omitting it,  
4 they deprived the plaintiff for an opportunity to look  
5 for those policies, which didn't have a two percent. I  
6 don't think the FM did but then, again, that's a breach  
7 -- that's something that the -- that the jury will have  
8 to determine.

9           So I'm denying the motion to dismiss the  
10 professional negligence claim for lack of proximate  
11 cause. I find that there are serious issues of fact  
12 there. The motion to subsume the breach of contract,  
13 negligence, and fiduciary claims, they're distinct.  
14 That's denied. And as to the -- as to the cap, I agree  
15 with plaintiff. If they breached their duty and caused  
16 a loss, it's up to the jury to determine that loss and  
17 the jury is not constrained by any cap on the Lexington  
18 policy.

19           The Lexington policy is the contract that  
20 plaintiff claims it wouldn't have taken had it known  
21 about other options and that policy doesn't control.  
22 It's the standard determination of what consequences  
23 flowed from anything that defendants are found to have  
24 done wrong and, again, a jury -- again, there are facts  
25 at issue here. I'm not saying a jury is going to --

1 I'm not granting the plaintiff's summary judgment. You  
2 know, plaintiff has some serious issues that it's going  
3 to have to confront and prove in order to sustain its  
4 claim of professional negligence. But that's -- again,  
5 that's why we have jury trials.

6 I find that there are -- there's no --  
7 nothing within the contracts, which are the client  
8 services agreements between the defendants and the  
9 plaintiffs, which in any way refer to a cap on damages  
10 for breach of those agreements and, therefore, that  
11 motion is also denied. Okay.

12 MS. PASTOR: Thank you, Your Honor.

13 MR. DEAL: Thank you, Your Honor.

14 THE COURT: Okay. Now, let's see. I'm  
15 trying to find the -- my law clerk did not highlight  
16 the -- well, I'll find the orders -- I have the orders  
17 in the other matter, but I'll find the orders in this  
18 case. Okay. Thank you, again, and I appreciate your  
19 efforts that went into this and you made my job a lot  
20 easier.

21 MS. PASTOR: Thank you, Your Honor.

22 MS. HENRICH: Thank you, Your Honor.

23 MS. PASTOR: Your Honor, would you mind if I  
24 asked a logistical question?

25 THE COURT: Sure.

1 MS. PASTOR: We have a trial date coming up  
2 and I was wondering if Your Honor is our trial Judge  
3 and this is our room.

4 THE COURT: No. You're not -- I'm not your  
5 trial Judge. I can tell you that.

6 MS. PASTOR: Okay. All right. And so, I  
7 guess, we don't know what room we have either. I'm  
8 thinking --

9 THE COURT: Yes. I don't know who you're  
10 having either. I won't be here. As I said, I'm on  
11 recall and I -- I get -- I get most of the month of  
12 August off and, July, I have to cover Special Civil for  
13 three weeks. That's my -- that's my other assignment.  
14 So between all of that, I couldn't do a jury trial of  
15 this magnitude. I wish I could. It would be fun, but  
16 I can't. Have a good day, everybody.

17 MS. PASTOR: Thank you. Enjoy your summer.

18 MS. HENRICH: Thank you, Your Honor.

19 THE COURT: Thank you.

20 (Proceedings concluded)

21

22

23

24

25

CERTIFICATION

I, SHERRY M. BACHMANN, the assigned transcriber, do  
hereby certify the foregoing transcript of  
proceedings, time from 9:53 a.m. to 11:56 a.m., is  
prepared in full compliance with the current  
Transcript Format for Judicial Proceedings and is a  
true and accurate non-compressed transcript of the  
proceedings as recorded.

*Sherry Bachmann*

SHERRY M. BACHMANN AOC #454  
G&L TRANSCRIPTION OF NJ

Date: July 2, 2018